Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	**PR Docket No. 93-144**
Commission's Rules to Facilitate	)	**RM-8117, RM-8030**
Future Development of SMR Systems	)	**RM-8029**
in the 800 MHz Frequency Band	)	
	)	
Implementation of Sections 3(n) and 322	)	**GN Docket No. 93-252**
of the Communications Act	)	
Regulatory Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j)	)	**PP Docket No. 93-253**
of the Communications Act --	)	
Competitive Bidding	)	

To: The Commission

REPLY COMMENTS OF UTC

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Dated: March 1, 1996

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Summary

The record indicates strong objection from all quarters of the private land mobile radio community to the reallocation of the General Category channels to the exclusive use of SMRs. UTC and others intend to seek formal reconsideration of this decision.

The unavailability of private non-commercial radio channels has caused many utilities and pipelines to request licensing in the upper 200 SMR channels as well as the General Category and lower 80 SMR channels. The FCC must take steps to protect the integrity of these critical public safety/public service systems.

UTC continues to support the FCC's proposal to require EA licensees to share the costs of relocating incumbents. A cost-sharing mechanism will encourage coordinated relocation of integrated incumbent systems and will streamline the negotiation and relocation process. UTC urges the FCC to require system-wide relocations of incumbents to comparable facilities. With regard to simulcast systems, comparability requires that an EA licensee obtain the same replacement frequencies for all sites within an incumbent's simulcast network. In addition, comparability requires the same degree of interference protection and channel separation that the incumbent currently enjoys.

UTC opposes the proposal for a one-sided definition of "good faith." It should not be defined in a way that would negate the very concept of "negotiation." Instead, it should be defined by reference to its common sense, everyday business meaning, and should

include an obligation by both parties to meet, exchange views, honor reasonable requests for information and give serious consideration to offers in a timely manner.

UTC continues to oppose the use of competitive bidding to assign licenses in the General Category channels. Such a requirement is patently unfair to the non-commercial licensees who have been compelled to use this band in building out their internal-use networks.

While elements from within the SMR industry have developed a proposal to obtain geographic licensing in a manner that avoids auctions, their plan does not necessarily represent the views of the private land mobile radio community and cannot be viewed as an industry consensus. The SMR developed plan raises significant concerns for UTC in terms of necessity, implementation and impact.

Non-SMR incumbents in the General Category and lower 80 SMR channels should be entitled to at least the same protections and rights as SMR incumbents licensed in this spectrum, including the right to remain without mandatory relocation and the right to make system modifications so long as the 22 dBu interference contour is not expanded. In addition, incumbent non-SMRs should be allowed to continue on their existing slow growth authorization schedules.

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REPLY COMMENTS OF UTC

Pursuant to Section 1.415 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] hereby submits its reply comments in response to the *Second Further Notice of Proposed Rule Making* (*Second FNPRM*) in the above-captioned proceeding.[2]

As the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines, UTC filed comments in this proceeding.

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[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] On January 16, 1996, the FCC's Commercial Wireless Division released an *Order*, DA 96-18, extending the reply comment date in this proceeding to March 1, 1996.

UTC's comments focused on: the ill-advised nature of the Commission's decision to reallocate the 800 MHz General Category channels exclusively to commercial services; the relocation rules for the upper 200 channels in the 800 MHz band; and the treatment of incumbents in the General Category. Below, UTC again addresses these issues in the context of the comments filed by other parties.

I. Commenters Oppose Reallocation of General Category

In its comments, UTC indicated its staunch opposition to the Commission's decision to reallocate the General Category channels in the 800 MHz band to the exclusive use of Specialized Mobile Radio (SMR) operators.[3] While UTC noted its intention to file a "petition for reconsideration" of this decision, given the underlying importance of this reallocation decision to the *Second FNPRM* and the Commission's failure to publish the *First R&O/Eighth R&O* in a timely manner,[4] UTC felt compelled to raise this issue in this proceeding. Based on a review of the comments filed on the *Second FNPRM*, a large number of parties agree with UTC and intend to file similar petitions for reconsideration.[5]

Comments by Consumers Power, Baltimore Gas and Electric, Duke Power and Entergy, underscore the importance of continued utility and pipeline access to the General

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[3] *First Report and Order and Eighth Report and Order (First R&O/Eighth R&O)*, PR Docket No. 93-144.

[4] Formal notice of the *First R&O/Eighth R&O* did not appear in the Federal Register until February 16, 1996, the day after comments were due on the *Second FNPRM*.

[5] Association of Public-Safety Communications Officials-International, Inc. (APCO); City of Coral Cables; Council of Independent Communications Suppliers (CICS); Entergy; Fresno Mobile Radio; General Motors (GM); Industrial Telecommunications Association (ITA); and Personal Communications Industry Association (PCIA).

Category frequencies to support critical public safety/public service functions. These utilities detailed the essential use of private mobile radio systems in providing for coordinated responses over a wide-areas to emergency situations, such as downed electrical lines, gas leaks and power outages. All of these utilities indicate that their use of General Category channels was not by choice but by necessity because the 800 MHz Industrial and Land Transportation (I/LT) channels within their service areas were exhausted. As a consequence, a reallocation of the General Category channels will effectively preclude the implementation and operation of these and other essential public service/public safety systems.

PCIA and ITA both question the data on which the Commission relied in determining that the overwhelming majority of General Category channels are used for SMR service. Echoing UTC, these commenters point out the inappropriateness of relying on a count of license records that are skewed by unbuilt, speculative SMR applications.[6] UTC reiterates that channel counts are an inaccurate indication of demand, and are an improper means of assessing the public interests in allocating additional spectrum for commercial use at the expense of public safety/public service.

The General Category must remain available to non-commercial private radio services. The General Category provides a critical "safety valve" for private network

[6] PCIA, p. 17, fn .44; and ITA pp. 5-6.

operators that are unable to obtain channels from within their own service pools to fully implement their essential communications systems.

II. Proposed Rules

A. Mandatory Relocation From Upper 200 Channels

The majority of the commenters support the general framework of the Commission's proposed two-phase relocation process to accommodate new Economic Area (EA) licensees in the upper portion of the 800 MHz band without disrupting the operations of incumbents. The first phase consists of a one-year voluntary negotiation period. During this voluntary period, the EA licensee and incumbents may negotiate any mutually agreeable relocation agreement. If no agreement is reached between the EA licensee and incumbent during the first phase, the EA licensee may initiate a two-year mandatory negotiation period, during which the parties are to negotiate in "good faith." If at the end of the mandatory negotiation period the parties are still unable to reach an agreement the EA licensee may request involuntary relocation of the incumbent's system. In such case, the EA licensee must bear all relocation costs of moving the incumbent to comparable replacement facilities.

UTC continues to support the adopted relocation process as the most efficient and equitable means to balance the incumbents' interests in maintaining system integrity with EA licensees' ability to offer service. However, any such support is conditioned on the application of the relocation safeguards to all incumbents, including non-SMR licensees.

A number of utilities and pipelines are licensed on the upper 200 channels of the 800 MHz band for the operation of private, non-commercial radio systems. For example, Duke Power indicates that 30 of the 63 channel pairs on which its 800 MHz system currently operates are in the upper 200 channels.[7] Clearly non-commercial incumbents are entitled to the same level of relocation protections as incumbent SMRs.

UTC opposes Nextel's recommendation to reduce the two-year mandatory negotiation period to one year.[8] Despite Nextel's attempt to justify such a reduction in terms of providing certainty to incumbents, its recommendation is a transparent attempt to further "game" the process of forcing incumbents out of spectrum that it wants to occupy. Contrary to Nextel's assertion, there is nothing to suggest that the relocation process in the 800 MHz band will be "far less complicated" than the relocations taking place in the 2 GHz microwave band. If anything, the 800 MHz relocations may tend to be more complicated, since unlike in the PCS/Microwave context many of the incumbents and EA licensees will be direct competitors. Moreover, in the 2 GHz proceeding the FCC took steps to identify suitable relocation spectrum, whereas in this proceeding it is not at all clear that there is sufficient replacement spectrum available in all areas of the country. Finally, if indeed Nextel is correct and the process turns out to be less complicated, the

[7] Duke Power, p. 4.
[8] Nextel, p. 25.

channels will be cleared more quickly and the two-year mandatory negotiation period will not hinder the process.[9]

1. Commenters Agree With The Proposal To Require EA Licensees To Share Costs of Relocating Incumbents

The majority of commenters support the adoption of a cost-sharing mechanism among the various EA licensees in order to promote a more orderly transition of incumbent systems. As Southern notes, the adoption of a pro rata cost-sharing requirement among all EA auction winners whose spectrum is occupied by an incumbent system is equitable because all of the EA licensees will benefit from the relocation.[10] In addition, given the Commission's rule that an incumbent licensee may compel all EA licensees in whose spectrum blocks it operates to collectively negotiate the incumbent's relocation, the assessment of pro-rata cost sharing obligations should be relatively straight forward.

2. ADR Should Be Used To Resolve Disputes Over Relocation

The majority of commenters agree with UTC in supporting the use of alternative dispute resolution (ADR) procedures to resolve disagreements between EA licensees and incumbents over the terms and conditions of relocation and reimbursement during the mandatory negotiation period. As the American Mobile Telecommunications Association

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[9] It should be recalled that the FCC is proposing that either party could mandate resort to alternative dispute resolution at anytime during the mandatory phase. Thus eliminating any concern of an incumbent using the length of the mandatory negotiation period to protract negotiations.

[10] Southern, p. 19

(AMTA) notes, ADR procedures have proven effective in numerous situations and will relieve the FCC from assuming the burden in all but the most intractable situations.[11]

Parties such as SMR Won and SMR Systems Inc. (SSI) join UTC in opposing the suggestion that industry trade associations be designated as arbiters of disputes between incumbents and EA licensees. As SMR Won notes, trade associations are not "sufficiently disinterested" to serve as dispute resolution arbiters.[12] In addition, the fact that the incumbents and EAs will often be direct competitors further necessitates the use of arbiters that are beyond a hint of impartiality. Despite the best of intentions, an industry trade association cannot offer the appearance of such neutrality. Accordingly, UTC continues to support the use of independent neutral third parties to act as arbiters unless the individual parties agree otherwise.

3. Comparable Facilities

In its comments UTC generally supported the minimum factors that the FCC has proposed for determining "comparability" of replacement facilities: (1) the same number of channels with the same bandwidth as its existing system; (2) relocation of the entire system; and (3) a new 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of the incumbent's original system.

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[11] AMTA, p. 14.

[12] SMR Won, p. 40.

A number of commenting parties discussed the issue of what is meant by the requirement to provide system-wide relocations. For example, Pittencrieff Communications suggests that an EA licensee should not be required to retune facilities outside its EA.[13] UTC disagrees. UTC submits that an incumbent is entitled to have its entire system relocated, including facilities/components that are licensed outside of a particular EA but which interoperate with facilities located within that EA. In addition, UTC reiterates its recommendation that in defining "comparable system" the rules specifically recognize the unique operational requirements of "simulcast" systems. Under a simulcast system, no individual site can have a frequency replaced without requiring the same replacement frequency being installed at all of the other sites in the network. Without a system-wide replacement of the frequency, the system will not function properly. For example, BGE indicates that in developing its wide-area network it has licensed the same block of channels at ten different locations throughout its utility service territory in order to provide simulcast operations.[14] BGE indicates that it cannot afford to have a single one of these channels relocated without devastating the reliability of its simulcast system. In order to protect these kinds of system the FCC's rules must require that for purposes of comparability, an EA licensee obtain the same replacement frequencies for all sites within an incumbent's simulcast network.

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[13] Pittencrieff Communications, p. 7.

[14] BGE, pp. 3-4.

In addition, UTC agrees with commenters such as Duke and Ericsson that the definition of comparability must include the equipment and labor costs of retuning/reprogramming all associated mobile units. [15] Finally, replacement facilities must also provide comparable interference protection and channel separation throughout the relocated system's footprint.

4. The Good Faith Requirement Should Not Substantively Impact The Ability Of The Parties To Negotiate During The Mandatory Negotiation Period

A number of commenters join UTC in opposing the Commission's suggestion that an incumbent's failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith.[16] As Digital notes, allowing an EA licensee to obtain such a presumption merely by offering what it claims to be comparable facilities totally fails to recognize that the issue of what are comparable facilities is at the very heart of relocation negotiations.[17] Further, as Duke points out, under such an arbitrary definition of good faith an EA licensee could turn honest concerns of an incumbent into the basis for allegation of "bad faith" on the part of the incumbent.[18]

Tying good faith to the acceptance of an EA licensee's offer of comparable facilities would undermine the Commission's stated intention that the parties actually negotiate and mutually agree on what constitutes comparable replacement facilities. The

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[15] Duke, p. 6; and Ericsson, p. 3.
[16] Digital Radio, p. 7; Duke, p. 10; SMR Won, pp.39-40; SSI, p. 8; and United States Sugar, p. 8.
[17] Digital Radio, p. 7
[18] Duke, p. 10.

term "good faith" should govern the conduct of negotiations during the mandatory negotiation period. It should not substantively restrict either party's ability to negotiate over replacement facilities. Accordingly, UTC renews its recommendation that the term "good faith" should therefore be given its common sense everyday business meaning: an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.[19]

B. Licensing of General Category Channels

In discussing new licensing procedures for the General Category channels the commenting parties appear more or less divided into two camps: (1) those like UTC who oppose any reallocation of the General Category channels to exclusive commercial use or any change in the licensing procedures; and (2) those who favor some sort of move to geographic licensing on the basis of negotiations among incumbents. Significantly, none of the commenting parties supports the Commission's proposal to license the General Category channels on an EA basis through competitive bidding.

Nearly all parties point to the impractical nature of conducting auctions on the heavily encumbered General Category channels, as well as the fundamental unfairness of such auctions on incumbent systems that would have no relocation option. As Entergy

[19] *Black's Law Dictionary*, Fifth Edition. In addition to these general requirements in the context of replacement negotiations good faith should also encompass an obligation between the parties to meet, exchange views, honor reasonable requests for information, and give serious consideration to offers in a timely manner.

correctly points out, the Commission itself has acknowledged that there are no equitable means of relocating incumbents and there are no identifiable alternative channels to accommodate incumbents.[20]

In addition to the lack of suitable spectrum for auctioning within the General Category channels, UTC's comments detailed the inappropriateness of auctions for non-commercial private licensees. UTC pointed out that unlike commercial entities that use spectrum to generate revenue, utilities, pipelines, and other public safety/public service entities use spectrum as integral tool to their offering of safe and reliable service to the public. These entities are often heavily regulated with regard to the expenditure of ratepayer or taxpayer funds and are not in a position to attempt to outbid commercial entities for the use of radio spectrum. Moreover, UTC explained that utility and pipeline operational requirements are constantly evolving, and their communications requirements may not correspond to the rigid timetable of auctions. Finally, UTC noted that utilities and pipelines license their communications systems on the basis of their underlying service territories which do not necessarily have any relation to the proposed geographic licensing areas of EAs. Accordingly, the build-out requirements would therefore impose an unnecessary and spectrally inefficient burden on these entities.

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[20] Entergy, p. 8.

C. The "Industry Solution" Is Not Necessarily Representative Of The Entire Industry

In seeking to accommodate the attributes of EA licensing while avoiding the imposition of auctions in the General Category and lower 80 SMR channels, SMR Won, AMTA and Nextel have developed what they purport to be an "Industry Solution." Under this plan, prior to conducting auctions on the General Category and lower 80 SMR channels the FCC would permit all constructed incumbents. including licensees relocated from the upper 200 channels, to request geographic-based licenses on their existing frequencies on a channel-by-channel basis. The plan calls for co-channel licensees to enter into settlements, joint ventures or other mutually-agreeable means of dividing up EAs. In this way, the plan's architects reason that mutual exclusivity will be avoided and the possibility of auctions would be eliminated.[21]

While the plan has some intriguing aspects to it and is clearly preferable to the auctioning of the General Category channels, the plan also raises some significant concerns. It should therefore be made clear that the plan does not at this time represent an "industry consensus." To UTC's knowledge, none of the private non-commercial radio user groups have endorsed this plan with regard to the General Category channels. Even under the FCC's license count a third of the licensees in the General Category are private

[21] AMTA, p. 20; SMR Won, pp. 10-11.

non-commercial entities.[22] Therefore given this level of private usage, it is highly misleading to characterize the proposal as an industry consensus.

As a preliminary matter, neither AMTA nor SMR Won have provided a compelling case as to why the existing site-specific licensing rules should be altered. Instead, they have contrived their plan as a means of meeting the Commission's desire to have EA licensing, but in a manner that avoids the use of auctions. However, it makes little sense to go through such convoluted exercises if the end-goal of EA licensing in the General Category does not serve the public interest. Site-specific licensing serves the public interest by allowing non-commercial licensees such as utilities, pipelines and public safety agencies to obtain licensing on the basis of their specific service territory requirements. It is also spectrally efficient because it allows licensees to obtain the precise amount of spectrum that they require: no more and no less.

From UTC's perspective the plan also raises questions as to who would be eligible for EA licensing. For example, would it allow unconstructed incumbent licensees to seek geographic licensing agreements? Many utilities, pipelines, and other private radio licensees are in the process of building their systems pursuant to multiple year construction schedules. Provided that incumbent licensees are in compliance with their authorized construction schedules they should be entitled to participate in any geographic licensing settlements. Further, as a practical matter the plan's implementation would have

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[22] Private non-commercial licensees make up a significantly larger percentage of constructed systems in the General Category, particularly in urban areas.

to be delayed for up three years since it includes the relocation of incumbents from the upper portion of the 800 MHz band (an aspect of the plan that would appear to be necessary). However, many of UTC's members cannot wait three years for access to the General Category channels.

Finally, if the plan were adopted it would have to make clear that an incumbent choosing not to participate in a joint venture EA would be able to have a license partitioned from the EA license and that would be "grandfathered" on a primary basis indefinitely.

D. Treatment of Incumbents In The General Category And Lower 80 SMR Channels

Many commenters agree with UTC that there should be no mandatory relocation of any incumbent licensees in the General Category and lower 80 SMR channels. There is no valid reason to make a distinction between the rights of incumbent SMRs and incumbent non-SMRs. As BGE correctly notes, just as with SMR incumbents, there is no available spectrum on which to relocate non-SMR incumbents from the General Category channels.[23]

Accordingly, UTC reiterates that non-SMR incumbents must be afforded at least the same rights as incumbent SMRs. Specifically, SMR and non-SMR incumbent licensees should be allowed to continue to operate under their existing site-specific authorizations. Incumbent non-SMRs should be allowed to continue on their existing slow growth authorizations schedules. In addition, all incumbent licensees should be able to

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[23] BGE, p. 4.

modify or add transmitters in their existing service areas, without prior notification to the Commission, so long as their 22 dBu interference contour is not expanded. Finally, as Consumers Power notes, the FCC must take action to fully protect private incumbent systems that are operating in the Canadian border areas.[24]

III. Conclusion

The record indicates strong objection from all quarters of the private land mobile radio community to the reallocation of the General Category channels to the exclusive use of SMRs. UTC and others intend to seek formal reconsideration of this decision.

The unavailability of private non-commercial radio channels has caused many utilities and pipelines to request licensing in the upper 200 SMR channels as well as the General Category and lower 80 SMR channels. The FCC must take steps to protect the integrity of these critical public safety/public service systems.

UTC continues to support the FCC's proposal to require EA licensees to share the costs of relocating incumbents. A cost-sharing mechanism will encourage coordinated relocation of integrated incumbent systems and will streamline the negotiation and relocation process. UTC urges the FCC to require system-wide relocations of incumbents to comparable facilities. With regard to simulcast systems, comparability requires that an EA licensee obtain the same replacement frequencies for all sites within an incumbent's

[24] Consumers Power, pp. 4-5.

simulcast network. In addition, comparability requires the same degree of interference protection and channel separation that the incumbent currently enjoys.

UTC opposes the proposal for a one-sided definition of "good faith." It should not be defined in a way that would negate the very concept of "negotiation." Instead, it should be defined by reference to its common sense, everyday business meaning, and should include an obligation by both parties to meet, exchange views, honor reasonable requests for information and give serious consideration to offers in a timely manner.

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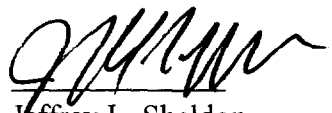
Non-SMR incumbents in the General Category and lower 80 SMR channels should be entitled to at least the same protections and rights as SMR incumbents licensed in this spectrum, including the right to remain without mandatory relocation and the right to make system modifications so long as the 22 dBu interference contour is not expanded. In addition, incumbent non-SMRs should be allowed to continue on their existing slow growth authorization schedules.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these reply comments.

Respectfully submitted,

UTC

By: 

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Dated: March 1, 1996

CERTIFICATE OF SERVICE

I, John Lanou, legal assistant of UTC, The Telecommunications Association, hereby certify that I have caused to be sent, by hand-delivery, on this Friday, March 01, 1996, a copy of the foregoing to each of the following:

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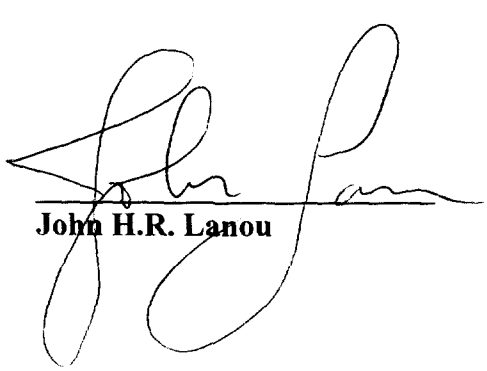

John H.R. Lanou